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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re N.F., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. J.K. et al., Defendants and Appellants.	D055922 (Super. Ct. No. J517116)

APPEALS from orders of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Affirmed.

J.K. (mother) and D.F. (father) (together, the parents) appeal a juvenile court order terminating their parental rights to their minor daughter N.F. under Welfare and Institutions Code section 366.26. (Statutory references are to the Welfare and Institutions Code unless otherwise specified.) They also appeal orders denying their petitions for

modification under section 388. The parents, who were both minors at the time of the dependency proceedings, contend: (1) the court's failure to appoint a guardian ad litem for mother was a miscarriage of justice, requiring reversal of the order terminating parental rights; (2) the court erred by denying mother's section 388 petitions for modification; and (3) mother received ineffective assistance of counsel. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2008 the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court under section 300, subdivision (g), alleging 11-day-old N.F. was at substantial risk of harm because she was left without any provision for support, and the whereabouts of her parents were unknown after reasonable efforts to find them were unsuccessful. Mother, who was 16 years old, left N.F. with the maternal grandmother and went to Los Angeles to be with father. When the parents returned to San Diego to get N.F., they had an argument with the maternal grandmother, requiring police intervention. N.F. was taken into protective custody.

The parents did not appear at the detention hearing and counsel was not appointed for them. The court made a prima facie finding on the petition, detained N.F. in out-of-home care and ordered Agency to continue searching for the parents.

The next day, social worker Mark Hood received a telephone call from mother, who said she was living with father in Compton and asked what she needed to do to have N.F. returned to her. Hood told mother that she must attend the upcoming court hearing and participate in services in San Diego. He arranged for a visit between mother and

N.F., but mother did not show up. In Hood's opinion, N.F. would be at risk in mother's care because mother had an unstable and chaotic lifestyle, she reportedly used marijuana, and she exercised poor judgment by running away and leaving N.F. in the care of the maternal grandmother, who had a substance abuse history as well as a history with child protective services.

Mother received notice of the jurisdiction and disposition hearings. However, she was not present on June 18 when the proceedings began, and counsel was not appointed for her. Hood informed the court that mother was on her way to San Diego from Los Angeles, so the matter was trailed. When mother had not arrived by 2:10 p.m., the court resumed the hearing. It sustained the allegations of the petition, declared N.F. a dependent, removed her from parental custody, placed her in foster care and ordered reunification services for the parents. At 2:30 p.m., after the proceedings had adjourned, mother arrived at court. The clerk gave mother the name and telephone number of social worker Hood.

A special hearing was set for July 14 to have counsel appointed for the parents. The hearing was trailed for one day because the parents missed their bus from Los Angeles. The parents appeared in court the next day and counsel was appointed for them. The court inquired about the need for appointment of a guardian ad litem. Mother's counsel said she had conferred with mother, and they both believed appointment of a guardian ad litem was not necessary. Counsel also said mother understood the allegations in the petition, and asked the court to modify the case plan to facilitate mother's participation in reunification services in Los Angeles where she lived. Mother

cancelled a scheduled visit with N.F. because she wanted to return to Los Angeles with father.

The parents continued to live in Compton with father's family for the next six months, even after their relationship ended. Mother was considered a runaway, and refused to return to San Diego to live with her parents. She was not in school and was not participating in services, despite having received referrals for therapy and parenting programs on numerous occasions. Mother did not drug test as required. Although 26 visits between mother and N.F. had been scheduled, mother visited only seven times. On three occasions, mother did not visit because she missed the bus. She cancelled several other scheduled visits.

According to an addendum report, mother had enrolled in services in Compton, but she had not completed a parenting course or a psychological evaluation, and she was not attending individual therapy. In the opinion of social worker Tanisha Cowan, mother displayed irresponsible behavior, had no proper parenting skills and had neither the maturity nor commitment to provide appropriate care for N.F. Mother had not mitigated the original protective issues and risk factors, she had not taken advantage of referrals for services and she was pregnant again. Additionally, her lack of contact with N.F. prevented her from developing an appropriate parent-child bond. Thus, Cowan recommended the court terminate services and set a hearing to select a permanent plan for N.F.

Mother appeared with counsel at the six-month review hearing. The court found that despite having received adequate services, mother had not made substantive progress

with her case plan, and there was no substantial probability N.F. would be returned to mother's custody in the next six months. The court terminated reunification services and set a section 366.26 selection and implementation hearing. Mother filed a notice of intent to file a writ petition. After appellate counsel reviewed the record and discussed the matter with trial counsel, he determined there were no viable issues for writ review. No petition was filed, and this court dismissed the case.

In February 2009 N.F. was placed in the home of maternal relatives, who expressed an interest in adopting her.

The next month, mother was arrested for burglary. She became a dependent of the Los Angeles County juvenile court and was placed in foster care in Riverside County. Mother gave birth in April 2009 to another girl, who remained in her care under the supervision of the Los Angeles County social worker and mother's foster mother.

On May 13, 2009, mother filed a section 388 petition for modification, requesting the court vacate the selection and implementation hearing, place N.F. with her and order services. Mother's petition alleged her circumstances had changed because she was now in foster care, enrolled in school, attending parenting classes, had a supportive foster mother and taking excellent care of her new baby. As to best interests, the petition alleged mother had the support of social workers to assist her with both children, she would be a good role model for her children and the children would be able to bond with each other. The court found mother had made a prima facie showing and ordered a hearing on what it later referred to as the "equitable" modification petition.

On August 10, 2009, mother's counsel filed another section 388 modification petition on behalf of mother, seeking to dismiss the dependency petition and have N.F. returned to mother's care. The petition alleged the court erred by not appointing a guardian ad litem for mother at the detention hearing. The petition further alleged it was in N.F.'s best interests to be raised by her mother. Finding a prima facie showing had been made, the court granted a hearing on what it called the "procedural" modification petition.

Social worker Julie Walker recommended against granting mother's modification petitions, noting mother's circumstances had not changed. Mother had been provided with many opportunities for individual therapy and parenting classes, but she had not made significant progress with her case plan. Although mother had begun to make changes in her life after she was arrested and placed in foster care, she would not be able to parent both children without the constant support, encouragement and supervision of mother's foster mother, who would soon give birth to her own child. N.F. had never lived with mother, and she looked to her current caregivers to meet her needs. Further, mother chose to live with father in Compton rather than consistently visit N.F. in order to establish a bond with her. In Walker's opinion, N.F. would be at risk if returned to mother's care.

At a combined hearing on the two modification petitions and to select and implement a permanent plan for N.F., the court received in evidence Agency's reports and the minute orders from the detention, jurisdiction and disposition hearings. The court heard the testimony of mother, her foster mother, social worker Hood, and the Riverside

County social worker in mother's own dependency case. In ruling on the procedural modification petition, the court found a guardian ad litem should have been appointed for mother, and the error was not harmless. However, the court denied the petition, finding the requested modification was not in N.F.'s best interests because mother could not safely parent her. The court also denied the equitable modification petition, finding mother had shown changed circumstances, but had not shown it was in N.F.'s best interests to be placed with her. The court then proceeded with the selection and implementation hearing and terminated mother's parental rights.

DISCUSSION

I

Mother contends the court erred by failing to appoint a guardian ad litem for her at the detention hearing. She asserts the absence of a guardian ad litem compromised her rights at key hearings because the court assumed jurisdiction of N.F. on a "weak" petition. She claims the error resulted in a miscarriage of justice, requiring reversal of the order terminating parental rights and returning the case to "square one." Father joins in mother's argument.

A

This appeal was filed following the termination of parental rights, but the claimed error occurred at hearings held more than a year earlier. No previous appeal or writ petition was filed challenging the court's jurisdictional or dispositional findings, which mother asserts erroneously resulted from the absence of a guardian ad litem, and the time for challenging these orders has long since passed. Ordinarily, "an appellate court in a

dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order," even if the issues involve constitutional rights. (*In re Meranda P*. (1997) 56 Cal.App.4th 1143, 1151-1152; see also *In re Janee J*. (1999) 74 Cal.App.4th 198, 208 ["waiver" rule applies unless due process forbids it].) However, because the issue regarding appointment of a guardian ad litem is properly before us on appeal from the order denying mother's procedural modification petition, we address it in that context.

B

Under section 388, a party may petition the court to change, modify or set aside a prior court order. The petitioning party has the burden of showing, by a preponderance of the evidence, there is a change in circumstances or new evidence, and the proposed change would be in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) Whether a previous order should be modified and whether a change would be in the child's best interests are determinations within the sound discretion of the juvenile court. (*In re Stephanie M*. (1994) 7 Cal.4th 295, 318; *In re Casey D*. (1999) 70 Cal.App.4th 38, 47.) The juvenile court's order will not be disturbed on appeal unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. When two or more inferences reasonably can be deduced from the facts, we may not substitute our decision for that of the juvenile court. (*In re Stephanie M.*, *supra*, at pp. 318-319; *In re Casey D.*, *supra*, at p. 47.)

Here, the juvenile court properly allowed mother to challenge the absence of a guardian ad litem in earlier proceedings by filing a section 388 modification petition.

(See *In re Jackson W.* (2010) 184 Cal.App.4th 247, 258 [section 388 is broad enough to encompass claims that may require change in prior court order]; *In re Justice P.* (2004) 123 Cal.App.4th 181, 189 [findings of proper notice may be challenged by filing section 388 petition].) The juvenile court found, and we agree, mother met her burden of showing changed circumstances in that new evidence was discovered by counsel, which showed a procedural error occurred when the detention, jurisdiction and disposition hearings were held without the appointment of a guardian ad litem for mother.

C

The role of a guardian ad litem in dependency proceedings is to make tactical and even fundamental decisions in the minor parent's best interests. (*In re M.F.* (2008) 161 Cal.App.4th 673, 680.) Before January 1, 2009, courts had a sua sponte duty to appoint a guardian ad litem for a parent it knew was a minor. (Former Code Civ. Proc., §§ 372, subd. (a), 373; *In re D.D.* (2006) 144 Cal.App.4th 646, 653; *In re A.C.* (2008) 166 Cal.App.4th 146, 155.) Currently, appointment of a guardian ad litem for a minor parent is required only if the minor parent is unable to understand the nature of the proceedings or assist counsel in preparing the case. (Code Civ. Proc., § 372, subds. (c)(1) & (c)(2); § 326.7.) Here, the detention hearing occurred in 2008 before the statute was amended. Because the juvenile court was aware that mother was a minor, it should have appointed a guardian ad litem for her. (See *In re M.F.*, *supra*, at p. 679.) Appointment of a guardian ad litem for mother at the detention hearing was crucial because her whereabouts were unknown, and counsel had not yet been appointed for her. (See *In re*

Ebony W. (1996) 47 Cal.App.4th 1643, 1647-1648 [court need not appoint counsel for indigent parent who does not appear or communicate request for counsel].)

The court's failure to appoint a guardian ad litem for a minor parent is not a jurisdictional defect, but instead is subject to review for prejudice. (*In re M.F., supra,* 161 Cal.App.4th at p. 680.) In ruling on mother's procedural modification petition, the juvenile court found the error was not harmless. We agree with this finding to the extent that mother's interests in challenging the allegations of the dependency petition were substantially prejudiced. Had a guardian ad litem been appointed at the detention hearing, more diligent efforts likely would have been made to locate mother because knowledge of her whereabouts was critical in adjudicating the petition under section 300, subdivision (g). More importantly, because mother still had no counsel at the jurisdiction and disposition hearings, a guardian ad litem likely would have successfully challenged the allegations under section 300, subdivision (g) based on indications mother's whereabouts were known. Indeed, mother arrived in court 20 minutes after disposition, and had no recourse other than to contact the social worker. As the juvenile court noted, a guardian ad litem could have put the matter back on calendar or moved for reconsideration. Because mother had no proper representation at this critical juncture of the proceedings, N.F. became a dependent of the court and was removed from mother's custody. Appointment of a guardian ad litem may have made a difference in the outcome of the jurisdiction and disposition hearings. The fact that mother later waived a guardian ad litem does not rectify the problem.

D

Although mother met her burden of showing changed circumstances based on the prejudicial nature of the procedural error that occurred, she has not shown the requested modification—dismissal of the dependency petition and return of N.F. to her care on the eve of the selection and implementation hearing—was in N.F.'s best interests. (*In re Justice P., supra,* 123 Cal.App.4th at pp. 192-193 [best interests showing required even when petition alleges due process violation].) Even after mother had the benefit of counsel and received more than a year of services, she was not committed to regaining custody of N.F. She regularly cancelled visits with N.F., often because she chose to be with father and maintain an unstable lifestyle rather than establish a relationship with her child. Despite receiving referrals for services in Compton, mother did not participate in therapy, parenting classes or drug testing as required. She continued to engage in immature and irresponsible behaviors and became pregnant again. She was arrested and incarcerated for six weeks, making herself even less available to N.F. Mother's lack of contact with N.F. prevented her from developing an appropriate parent-child bond.

At the time of the hearing on the section 388 petitions, the focus of the proceedings was on providing N.F. with a safe, stable and permanent home. Although mother began to make positive improvements once she became a dependent and was placed in foster care, she did too little too late. During visits with N.F., mother was unable to show she could properly parent both N.F. and her other child. Her role was that of a "friendly visitor" rather than a parent. Mother minimized her shortcomings and

lacked insight and empathy. Because mother had her own significant needs, she could not safely parent N.F.

In the meantime, N.F. had bonded with her caregivers, with whom she had lived for seven months. At this point in the proceedings, there was a rebuttable presumption that continued out-of-home care was in N.F.'s best interests. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The court evaluated all the evidence in light of N.F.'s need for stability and security, and found her best interests would not be served by removing her from a stable and loving home and placing her with mother. The court acted well within its discretion by denying mother's request to dismiss the dependency petition and return the case to "square one," or alternatively, to place N.F. with her.

E

The court also properly denied mother's equitable modification petition. Even assuming mother met her burden of showing changed circumstances because she was now in a stable foster care placement with a supportive foster mother, had enrolled in school, was attending parenting classes and was taking excellent care of her new baby, mother did not meet her burden of showing it was in N.F.'s best interests to vacate the selection and implementation hearing and place N.F. with mother. As we previously discussed, mother was not able to safely parent N.F., and she was not a parental figure to her. Although mother argues it was in N.F.'s best interest to be raised by her biological mother, "[t]he presumption favoring natural parents by itself does not satisfy the best

interest prong of section 388." (*In re Justice P., supra,* 123 Cal.App.4th at p. 192.) No miscarriage of justice occurred.

II

Mother contends her first two attorneys provided her with ineffective assistance of counsel because they: (1) failed to challenge the jurisdictional findings under section 300, subdivision (g); (2) waived appointment of a guardian ad litem on her behalf; and (3) failed to raise these issues in a writ petition under California Rules of Court, rule 8.452. (All rule references are to the California Rules of Court.) Mother asserts counsel's negligence resulted in prejudice when her parental rights were terminated. Father joins in this argument.

A

To succeed on a claim of ineffective assistance of counsel, a parent must show counsel's representation fell below an objective standard of reasonableness, and the deficiency resulted in demonstrable prejudice. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1407; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Unless the record on appeal affirmatively establishes counsel had no rational tactical purpose for the challenged act or omission, we must affirm the judgment. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 293; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 255.) Moreover, we need not evaluate whether counsel's performance was deficient before examining the issue of prejudice; rather, we may reject a claim of ineffective assistance of counsel if there is no showing that but for trial

counsel's failings, the result would have been more favorable to the appellant. (*In re Jackson W.*, *supra*, 184 Cal.App.4th at p. 261; *In re Nada R.*, *supra,* at p. 1180.)

B

The record before us does not affirmatively establish counsel had no rational tactical purpose for failing to challenge the allegations under section 300, subdivision (g), waiving appointment of a guardian ad litem, and failing to file a writ petition under rule 8.452. More importantly, we cannot say the outcome—termination of parental rights—would have been different had counsel provided what mother believes was effective representation.

Regardless of counsel's alleged failings and the absence of a guardian ad litem when these proceedings were initiated, Agency was justified in filing a dependency petition, and the court reasonably assumed jurisdiction of N.F. Mother left newborn N.F. without provision for support, and chose her relationship with father over her relationship with her child. Up to the time mother was arrested and placed in foster care, her ongoing irresponsible behavior and lack of motivation to participate in services or establish a relationship with N.F. prevented reunification. Once her situation stabilized and she began to access services, mother was never able to show she could properly parent N.F. The remedy mother seeks—dismissing the petition or placing N.F. with her under a voluntary services contract—is not a viable option.

Despite the fact that this case got off track initially when mother had no representation, it was ultimately mother's inability or unwillingness to reunify with N.F. that caused her to lose her parental rights. N.F. is now two years old and has never lived

with mother. She is thriving in the home of maternal relatives who want to adopt her. N.F. deserves to have her custody status promptly resolved and her placement made permanent and secure. Her best interests would not be promoted by returning to "square one" and relitigating this case.

DISPOSITION

The orders are affirmed.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.